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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1961.

No. 566

RUSSELL GLENWOOD FULTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FRANCIS HEISLER
JEROME ROTENBERG
7 South Dearborn Street
Chicago 3, Illinois
Attorneys for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

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No.

RUSSELL GLENWOOD FULTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Russell Glenwood Fulton, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit, which Court affirmed the judgment of the United States District Court for the Northern District of Ohio, Western Division, finding the petitioner guilty of violating Title 18, Section 1343, United States Code, and sentencing him to the custody of the Attorney General of the United States for a period of five years.

JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment of the United States District Court for the Northern District of Ohio, Western Division, was entered on September 26, 1960, without opinion and is not reported. The opinion of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court was filed October 24, 1961, Nos. 14422-3, and is not yet reported, but is set forth in Appendix A.

JURISDICTION.

This petition is filed within thirty days after the entry of the judgment of the United States Court of Appeals for the Sixth Circuit, and the statutory provision conferring jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, Section 1254 (1), United States Code.

QUESTIONS PRESENTED.

I.

When two defendants are tried jointly, may the Trial Court unqualifiedly instruct the jury that they may consider all of the testimony as to both defendants after having previously admitted certain conversations, which were hearsay as to the petitioner, only as to the other defendant, and without instructing the jury that in order to consider the testimony as to both defendants, they must first find that there was a common design or concert of action existing between the two defendants?

II.

Was it not error for the Court of Appeals to sustain the judgment of the District Court which was based on an equivocal direction to the jury of an ultimate issue?

III.

Where it appears from the evidence that the defendant was convicted solely on the basis of conjecture, suspicion and probability that a telephone call made by him was an interstate one, should it not be determined, as a matter of law, that there was insufficient evidence to authorize a conviction in a case where the defendant offered no evidence, but relied upon a motion for judgment of acquittal?

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix B.

(1) Title 18, Section 1343, United States Code.

(2) Sixth Amendment, United States Constitution.

STATEMENT OF THE CASE.

The petitioner was indicted for violating Section 1343, Title 18, United States Code (Appendix B), and was charged with having made a telephone call from Chicago, Illinois, to Holland, Ohio, on or about July 14, 1960, for the purpose of executing a scheme to defraud. There were three counts in the indictment with the petitioner being named only in Count Two while the co-defendant Green was named in Counts One and Three. He pleaded not guilty and after a jury returned a verdict of guilty, the Trial Court committed the petitioner to the custody of the Attorney General of the United States for a period of five (5) years (page 13a of the Appendix filed before the United States Court of Appeals for the Sixth Circuit, a certified copy of which is filed herein, and hereinafter referred to as (App. p. 13a)).

The Government's first witness was a Mrs. Julia Alpert (App. p. 14a-App. p. 23a) who stated that she was the manager of an apartment building in Chicago, Illinois, in which she rented a room to a man by the name of Peters on June 24, 1960 (App. p. 15a), whom she identified to be the co-defendant Green (App. p. 16a). During the direct examination of Mrs. Alpert, the petitioner objected to certain testimony of Mrs. Alpert on the grounds that it was hearsay (App. p. 17a) and this objection was sustained. Mrs. Alpert made no mention of the petitioner.

The next Government witness was Mrs. Bessie M. Fall, the alleged victim of the alleged scheme to defraud (App. p. 23a-App. p. 110a) who testified that she lived in Holland, Ohio and that her telephone number was UNiversity 5-4642. She further stated that she was contacted by a Fred Cook on July 1, 1960, whom she identified to be the co-defendant Green (App. p. 27a) and who stated that he was employed by the Harrison-Fisher Company (App. p. 29a) which was a horse betting company located in Chicago. He also told her that he would arrange to get her a $5,000.00 credit with his company and that he would call her every day to give her tips on race horses to bet (App. p. 31a). She was then to call MIdway 3-3275, Chicago, Illinois, and place bets on these horses. Mrs. Fall agreed to this and began calling the Chicago number each day to place her bets.

On July 14, 1960, Mrs. Fall met the co-defendant Green at the Toledo Airport (App. p. 37a) and he told her that it would be necessary for her to actually put up a $5,000.00 cash deposit with his company. Of this amount he said that he could raise $3,500.00, and she would have to put up $1,500.00 which she did give to him (App. p. 38a). After he received the $1,500.00 from Mrs. Fall, Green told her to call Chicago and tell them to have a

Mr. Michaels call her (App. p. 40a), whom she should tell that she wanted to withdraw $55,000.00 of her winnings which amounted to $63,136.00 at this time.

Mrs. Fall called Chicago (App. p. 42a) and left a message for Mr. Michaels to call her at about five o'clock. He did call her at about five o'clock and stated that he would bring the $55,000.00 to Toledo on the next day (App. p. 43a). On July 15, 1960, Mr. Michaels, whom Mrs. Fall identified as the petitioner Fulton, arrived at her home and said that he had the money in the black case he was carrying; but he stated that before he could give her the money his boss insisted that she "show me $9,000.00 in your hand" (App. p. 44a) because at one time in her betting she was approximately $9,000.00 short in her account (App. p. 45a).

Mrs. Fall stated that on July 15, 1960, she received a call from the co-defendant Green (App. p. 47a), and they discussed the raising of the $9,000.00 after she informed him of petitioner Fulton's visit. It was decided that she would raise $7,000.00 of the money and co-defendant Green was to get the remaining $2,000.00 (App. p. 51a), and that they were to meet in Toledo on July 21 (App. p. 53a). It was at that time that Green, and later the petitioner Fulton were arrested by agents of the F.B.I. (App. p. 54a).

On cross-examination, Mrs. Fall stated that she did not know where the call came from that she received from petitioner Fulton on July 14, 1960, at about five o'clock (App. p. 105a, App. p. 108a).

During the course of Mrs. Fall's direct examination, the petitioner objected to various conversations related by Mrs. Fall that took place outside of his presence on the grounds of hearsay (App. p. 26a, App. p. 27a, App.

p. 28a, App. p. 41a, App. p. 48a). After these objections were made, the Trial Court at times advised the jury that this testimony was not to be connected with the petitioner (App. p. 28a, App. p. 31a, App. p. 41a).

At the conclusion of Mrs. Fall's testimony, the Government, in the presence of the jury, requested the Trial Court to instruct the jury that they could hear all of the testimony as to both defendants on the grounds that the Government had sufficiently proved a scheme to defraud (App. p. 109a). The Trial Court thereupon said that what the Government counsel had stated was true and instructed the jury to consider all of the testimony as going to both of the defendants. Petitioner's objections to this were of no avail (App. p. 109a, App. p. 110a).

Government witness Robert Stahle of the Illinois Bell Telephone Company testified that the only telephone call from Chicago, MIdway 3-3275 to Holland, Ohio, UNiversity 5-4642 on July 14, 1960, was one made at 11:00 P.M. (App. p. 119a) and not at 5:00 P.M.

At the close of the Government's case, the petitioner's oral motion for judgment of acquittal was denied. The petitioner offered no evidence in his behalf. His written Renewed Motion for Judgment of Acquittal, or, in the alternative, Motion for New Trial (App. p. 7a) was also denied.

The petitioner filed an appeal to the United States Court of Appeals for the Sixth Circuit, and said Court of Appeals affirmed the judgment of the District Court (Appendix A).

REASONS FOR GRANTING THE WRIT.

This Court should exercise its jurisdiction in this case for the following reasons:

1. There is involved herein an important question in the administration of federal criminal justice in that it raises the issue of the correct procedure to be followed by the Trial Court in submitting a case to the jury wherein there are multiple defendants.

2. The decision of the United States Court of Appeals for the Sixth Circuit is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *United States* v. *Pronger*, 287 F. 2d 498 (1961), on the question of whether or not the common design or common concert of action of multiple defendants is a matter to be determined by the jury or the Trial Court. This decision is in conflict with the proper procedure to be followed in such cases as outlined in a decision of the United States Court of Appeals for the Sixth Circuit in *Schmeller* v. *United States*, 143 F. 2d 544 (1944).

3. The decision of the United States Court of Appeals for the Sixth Circuit, as it applies to an equivocal direction to the jury on a basic issue by the Trial Court, is in conflict with a decision of this Court in *Bollenbach* v. *United States*, 326 U.S. 607 (1946), as well as the Sixth Amendment to the Constitution of the United States.

ARGUMENT.

I.

After the Government's key witness, Mrs. Bessie M. Fall, had finished her testimony, but before the Government rested its case, the Government counsel, in the presence of the jury, moved the Trial Court to instruct the jury that they should consider all of the evidence as going to both of the defendants and stated (App. p. 109a):

> "Mr. Colasurd: Your Honor, there were various objections by Mr. Rotenberg on much of the testimony previously offered on the basis of the fact that Mr. Fulton was not present nor was there any proof of a scheme to defraud. I think the Government has now sufficiently proved that and I would like to have the jury instructed that they can hear all the testimony with reference to both men."

The Trial Court then advised the jury (App. p. 109a):

> "The Court: That is true. The jury may consider the testimony insofar as it has been offered at this time as going to both of the defendants."

The objections of petitioner's counsel to this procedure were overruled (App. p. 109a-App. p. 110a).

On numerous occasions petitioner's counsel made objections to various testimony of Government witnesses on the grounds of hearsay in that the conversations between the witnesses and others took place outside of the presence of the petitioner (App. p. 17a, App. p. 26a, App. p. 27a, App. p. 28a, App. p. 41a, App. p. 42a). In response to these objections the Trial Court assured the petition-

er's counsel that the objected to testimony was not to be connected with the petitioner. At one point the Trial Court stated (App. p. 28a):

> "The Court: They (the jury) may be so admonished at this time that it is not to be,—that what is being said here is not to be connected with the Defendant Fulton."

Later during Mrs. Fall's testimony the Trial Court stated:

> "The Court: Up to this point there has been no testimony with reference to the Defendant Fulton."

The Trial Court later advised the jury (App. p. 31a):

> "The Court: (Interposing) The jury will understand that none of this conversation has any connection whatever with the other defendant in this case, Russell Glenwood Fulton. • • •"

At another point in Mrs. Fall's testimony the Trial Court stated (App. p. 41a):

> "The Court: The jury has been instructed that there is no connection so far with the Defendant Fulton who is claimed to have the alias of Michaels. • • •"

Although the petitioner urged to the United States Court of Appeals for the Sixth Circuit that the Trial Court committed error in giving such an instruction to the jury and cited the cases of *United States* v. *Pronger*, 287 F. 2d 498 (7 Cir. 1961), and *Schmeller* v. *United States*, 143 F. 2d 544 (6 Cir. 1944), in support of his contention, said Court of Appeals did not refer to these cases in its opinion.

In the *Pronger* case the Government prosecutor also requested, at the close of the case, that certain conversa-

tions that took place outside of the presence of the defendant Pronger be admitted as to Pronger because a *common* scheme or plan had been shown to have existed between Pronger and the co-defendant. The Court then instructed the jury as follows:

> "'• • • during the course of the trial there was testimony as to some conversations which I instructed you should only be considered as to one or the other of the two defendants.
>
> • • •
>
> "'Likewise, a conversation had by the witness Kadet on August 3, 1959, • • • but in any event at the time that Kadet testified that he talked to Roberts; as you will recall, I limited that testimony to the defendant Roberts. Now you may consider it as to both defendants.
>
> "'The question still is, of course, whether or not you find that there was any *common design* (emphasis ours) between these two defendants, *any common concert of action* (emphasis ours) between the two defendants, with regard to any of the charges that are made in this case. It will be for you to determine, from the evidence, whether or not the defendants are guilty of the charges, beyond a reasonable doubt. But I instruct you that you may consider the limitation that was placed upon the testimony as to these conversations, so far as being limited to one or the other of the defendants as I have indicated, is now removed.'"

In reversing the conviction of Pronger, the United States Court of Appeals for the Seventh Circuit stated on page 500 of its opinion:

> "In a case such as this a defendant cannot be bound by the acts or declarations of another defendant until the *common design or common concert of action* (emphasis ours) between the two defendants and their participation have been established. *Glasser*

v. *United States*, 315 U.S. 60, 74, 62 S.Ct. 457, 86 L.Ed. 680; *United States* v. *United States Gypsum Co.*, D.C., 67 F. Supp. 397, 451; *May* v. *United States*, 84 U.S. App. D.C. 223, 175 F. 2d 994, 1008.

"Whether intentional or not, we believe that the Court's remarks had the effect of telling the jury that the *common design or common concert of action* (emphasis ours) of Roberts and Pronger, as charged, had been proved. If they did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury. 'A conviction ought not to rest on an equivocal direction to the jury on a basic issue.' *Bollenbach* v. *United States*, 326 U.S. 607, 613, 66 S.Ct. 402, 405, 90 L.Ed. 350.'"

The Trial Court in the case at bar went much further than the Trial Court in the *Pronger* case because at no time in the case at bar did the Trial Court advise or instruct the jury that they must first find that there was a *common design or common concert of action* existing between the petitioner Fulton and co-defendant Green. The Trial Court admitted the objected to testimony to be considered by the jury against the petitioner, as was pointed out, on the grounds that there was a "scheme to defraud", and in his final charge to the jury he merely instructed the jury that the Government must prove beyond a reasonable doubt that the petitioner devised a scheme to defraud without once referring to the *common design or common concert of action* aspects of the case. However, the objected to testimony would be admissible not merely if it was proven beyond a reasonable doubt that petitioner Fulton devised a scheme to defraud, but *only* if it was proved that he was engaged in a *common design or common concert of action* with the co-defendant Green to commit the crime alleged in the indictment. The Trial Court, therefore, was assuming the fact that the

common design or common concert of action existed without leaving the determination of this basic issue to the jury.

The offering of an instruction by the petitioner to the Trial Court as to the principles to be used by the jury in determining whether or not to consider all of the testimony as to both of the defendants would have been fruitless inasmuch as the Trial Court had already instructed them (the jury) that they should consider all of the testimony despite petitioner's objections thereto.

The *Schmeller* case, cited to the United States Court of Appeals for the Sixth Circuit, suggests a procedure to be followed by the courts in the admission of evidence in trials involving multiple defendants. In that case the several defendants were indicted for conspiracy and several substantive counts. During the course of the trial various objections were made to certain documents offered in evidence on the grounds that they were not connected with the charges against the individual defendants personally. The Court of Appeals for the Sixth Circuit in its opinion in that case said on page 550:

> "The Court overruled this objection, stating 'On the failure of the Government to tie in any of these defendants to the conspiracy, or to establish a conspiracy, at that time they may be ruled out. Until such time they will be received.' This statement was repeated by the Court in overruling similar objections made by one or another of the numerous defendants as to the admission of testimony not on its face applicable to the particular defendant; and the Court then instructed the jury that the exhibits were received 'at this time with the very definite understanding that they cannot apply and cannot be used against the various defendants if their connection with this conspiracy is not established, or a conspiracy is not established by the United States Govern-

ment.' However, the Court in its general charge did not instruct the jury that in the event the conspiracy was not established the evidence should be disregarded, and gave no instruction whatever on the subject. Since the jury found that no conspiracy existed, and that none of the appellants was connected with the conspiracy charge, appellants contend that the jury could not rightly consider this evidence with reference to the substantive charge. Appellants were plainly entitled to have such an instruction included in the general charge if they had requested it, but no such request was made."

The Court in reversing the Trial Court went on to say that the defendants were entitled to have such an instruction in the general charge and the failure to request such a charge after the evidence was concluded did not amount to a waiver inasmuch as it was plain and prejudicial error.

From the foregoing cases it appears that a procedure the Trial Court could have properly followed would have been to admit the objected to testimony subject to the Government proving that the petitioner and Green were engaged in a *common design or common concert of action* in a scheme to defraud Bessie Fall. If, at the close of the case, the Trial Court believed that the Government had not proved such a common design, it should then have instructed the jury to disregard that testimony not connected to the particular defendant or in other words that the objected to testimony could only be used as against the particular defendant who was present when the conversations took place. If on the other hand, the Trial Court believed that such a *prima facie* showing of a common design had been made by the Government, it should *not* have made this fact known to the jury by unqualifiedly advising them that they could consider all of the evidence as to both defendants as was done in the

case at bar. Instead the Trial Court should have instructed the jury along the following lines in its general charge:

> "The Government has in this case presented evidence as to statements made in the absence of the different defendants. Before you are permitted to consider such evidence as to any particular defendant, you must first find that the Government has established beyond a reasonable doubt apart from such statements (1) that the particular defendant and the person making the statement or statements were engaged in a common design or common concert of action in devising the scheme to defraud described in the indictment, and (2) that the statement or statements were made pursuant to and in furtherance of the scheme to defraud.
>
> "If the Government has established both (1) and (2) to a particular defendant, then you may consider such evidence in passing upon the guilt or innocence of such defendant and give it such weight as you feel it justly entitled to.
>
> "If the Government has not so established both (1) and (2), then you should reject such evidence and give it no consideration in passing upon the guilt or innocence of such defendant."

Without giving such a cautionary instruction as the foregoing, the Trial Court was in effect telling the jury that the common design between the petitioner and Green had been proved, and as evidenced by the general charge given to the jury only left them to decide whether the Government had proved a scheme to defraud, and even did not entirely leave that matter up to the jury because as already pointed out when Mrs. Fall finished her testimony, the Trial Court told the jury to consider all of the evidence as to both defendants on the grounds that the Government had sufficiently proved a scheme to defraud. As also previously pointed out, the request of a caution-

ary instruction by the petitioner would have been of no avail and would have only added to the confusion of the jury because of the Trial Court's earlier instruction.

Since the Trial Court assured the petitioner's counsel that certain testimony did not apply to the petitioner, there was no need for the petitioner to cross-examine witnesses concerning certain of their testimony nor to make objections to certain offered testimony that might have been objectionable on grounds other than hearsay because such testimony did not aply to the petitioner. As borne out by the record, petitioner's counsel conducted no cross-examination of the Government's first witness, Mrs. Alpert, and only a very limited one of the key witness, Mrs. Fall. When later during the course of the trial the objected to testimony was suddenly admitted into evidence against the petitioner by the Trial Court, the petitioner's right to be confronted with the witnesses who testified against him had been seriously prejudiced in derogation of that right guaranteed him by the Sixth Amendment to the Constitution of the United States.

II.

By agreeing with the Government counsel that a scheme to defraud had been sufficiently proved and then instructing the jury that they could consider all of the testimony as to both of the defendants, the Trial Court was in effect directing the jury to find that the Government had proved a scheme to defraud and also that there was a common plan or concert of action established as to the petitioner and the co-defendant Green. The determination of these basic issues should have been left to the jury for its consideration as this Court has stated that a conviction should not rest upon an equivocal direction to the jury on a basic issue. *Bollenbach* v. *United States*, 326 U.S. 607 (1946).

Although it is true that the Trial Court, in its general charge, did advise the jury that the Government must prove beyond a reasonable doubt that the petitioner devised a scheme to defraud, the courts have held that the expression of an opinion by a trial judge on the ultimate issues to be decided by the jury cannot be overcome by his admonishing the jury that they are not bound by his opinion. See *United States* v. *Meltzer,* 100 F. 2d 739 (7 Cir. 1938).

III.

Although the law is that the evidence should be considered in a light most favorable to the Government, it is still the petitioner's contention that there was insufficient evidence presented in this case to convict the petitioner.

In order to sustain a conviction of the crime charged here, there must be a showing that the telephone call in question was not only for the purpose of executing the alleged scheme but also that it was an interstate one.

The evidence is uncontradicted to the effect that Mrs. Fall received a call from the petitioner on July 14, 1960. However, Mrs. Fall stated that she did not know the origin of this call and was only taking it for granted that it came from Chicago, Illinois (App. pp. 105a, 108a). She also stated no less than eight times during the course of the trial that she received this call at about 5:00 P.M. (App. pp. 41a, 42a, 67a, 68a, 69a, 105a, 106a). The Government attempted to prove the interstate character of this telephone call by showing that a call was made to Mrs. Fall at 11:00 P.M. from the Chicago number of Midway 3-3275 (App. p. 119a). However, there was no showing that the petitioner was in Chicago on July 14, 1960, or that he ever was in the apartment where this

number was located. Since there was no evidence as to the nature of the 11:00 P.M. call from Chicago Midway 3-3275 to Mrs. Fall, it cannot be said that the petitioner caused this call to be made or that it was in furtherance of a scheme to defraud.

Therefore, if the guilt of the petitioner is to be inferred in this case, it must be done so from circumstantial evidence. The courts have held that the circumstances must be such as to exclude every reasonable hypothesis other than that of guilt. *Copeland* v. *United States*, 90 F. 2d 78, 79 (5 Cir. 1937), *Toulin* v. *United States*, 93 F. 2d 861, 866 (1938); and where those circumstances are as consistent with innocence as with guilt, they have no probative value. *Tingle* v. *United States*, 38 F. 2d 573, 575 (1930). In *Kassin* v. *United States*, 87 F. 2d 183, 184 (5 Cir. 1937), the court held that circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt and also that the circumstances must point not to the possibility or probability of guilt, but to the moral certainty of guilt.

CONCLUSION.

Wherefore, for the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS HEISLER,
JEROME ROTENBERG
7 South Dearborn Street
Chicago 3, Illinois
Attorneys for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 14422-3

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 14422
WILLIAM FRED GREEN,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 14423
RUSSELL GLENWOOD FULTON,
Defendant-Appellant.

APPEALS from the United States District Court for the Northern District of Ohio, Western Division.

Decided October 24, 1961.

Before: MILLER, Chief Judge, McALLISTER and WEICK, Circuit Judges.

PER CURIAM. Appellants were found guilty by a jury under an indictment charging them with having devised a scheme or artifice to defraud, and the use of an interstate telephone call for the purpose of executing such scheme or artifice, in violation of the provisions of Section 1343, Title 18, United States Code. Each appellant received a sentence of five years.

Appellants contend that the evidence was insufficient to take to the jury the question of whether a scheme or artifice to defraud existed on the part of the appellants. We find no merit in this contention.

Appellant Fulton contends that the Government's evidence failed to prove that telephone call on July 14, 1960, relied upon by the Government as the interstate call by this appellant, was an interstate call. The evidence fully supported the Government's contention that appellant Fulton, or someone acting at his direction, made this telephone call to the victim of the scheme in Holland, Ohio, on July 14, 1960. Although the origin of this call was not testified to by the victim, we are of the opinion that the records of the telephone company introduced by the Government, were sufficient to take to the jury the question of whether the call originated in Chicago, Illinois, as contended by the Government, and so constituted the interstate use of the telephone required under the statute and the indictment.

Complaint is made that the District Judge in reviewing the evidence in his charge to the jury made several misstatements of fact, and in commenting upon the evidence, referred to the evidence which was most favorable to the prosecution and did not refer to the unfavorable evidence to the Government that had been brought out by cross-examination. The District Judge told the jury that he was speaking from notes taken during the course of the trial; that the jury was the arbiter and final judge of the facts in the case. At the conclusion of the charge, no objections were made by appellants to the remarks now complained of, as required by Rule 30, Rules of Criminal Procedure. We are of the opinion that any errors which may have been made in this respect were not such plain errors affecting substantial rights of the appellants as to require reversal of the judgments under Section 52(b), Rules of Criminal Procedure. *Conley* v. *United States*, 257 F(2) 141, 144, C.A. 6th.

Appellant Fulton complains of the statement by the trial judge to the jury during the course of the trial, in which he told the jury that certain evidence previously admitted against the defendant Green could be considered as against both defendants, in that the scheme to defraud on the part of the two defendants had by that time been "sufficiently proved." We do not construe this, as contended by the appellant, that the District Judge by such a remark instructed the jury that the issue of whether a scheme of artifice to defraud existed was no longer a question for its consideration, but consider it only as a ruling that the evidence on that issue had become sufficient by that time to make the evidence in question against Green also admissible against Fulton. That the issue of whether a scheme or artifice to defraud existed was still a question for the jury is made plain by the Court's final instructions to the jury. We are of the opinion that there was no prejudicial error in this respect. *Rule 52(a), Rules of Criminal Procedure; Cottingham* v. *United States*, 228 F(2) 904, C.A. 6th; *Clarke* v. *United States*, 132 F(2) 538, 541, C.A. 9th, cert denied, 318 U.S. 789.

The judgments are affirmed.

JUDGMENT.

October 24, 1961

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ Shackelford Miller, Jr.
Chief Judge

APPENDIX B.

Title 18, Section 1343, United States Code—Fraud by wire, radio or television:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of execution such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, C. 879, S18 (a), 66 Stat. 722, Amended July 11, 1956, C. 561, 70 Stat. 523.

Amendment VI, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 566

RUSSELL GLENWOOD FULTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 183–185;[1] Pet. App. 1a–3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1961 (R. 182; Pet. App. 3a). The petition for a writ of certiorari was filed on November 22, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the appendix to appellant's brief in the court below.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the conviction for the use of interstate telephone wires in furtherance of a scheme to defraud.

2. Whether the trial court's ruling as to the evidence to be considered amounted to a direction to the jury to convict.

STATEMENT

A three-count indictment returned in the United States District Court for the Northern District of Ohio charged petitioner and one Fred Green with use of interstate telephone wires in execution of a scheme to defraud, in violation of 18 U.S.C. 1343 (R. 5–7).[1] Following a jury trial, petitioner and Green were found guilty as charged. On September 23, 1960, petitioner was sentenced to five years imprisonment (R. 13–14). On appeal, the convictions were unanimously affirmed as to each defendant.[2]

The pertinent facts may be summarized as follows:

1. On July 1, 1960, at a meeting with Mrs. Bessie Fall of Holland, Ohio, Green, who called himself "Fred Cook", said that he worked for the "Harrison-Fisher Company", which was the "largest book" in the United States; that he knew when trainers and horses; that he would pass that information on to

[1] Co-defendant Green was charged in counts 1 and 3 with having used or having caused the use of interstate telephone wires on two dates for the purpose of furthering the scheme to defraud.

[2] Green has not joined in the petition for a writ of certiorari.

owners of horses were going to place bets upon her; and that she "was to give him half of the profit[s]" (R. 27–30, 32, 99–100). He further stated that he would try to arrange a $5,000 "credit" for Mrs. Fall's account; that he would telephone her each day from Chicago and give her the horses on which she should place bets; and that she should telephone the "Harrison-Fisher Company" at MIdway 3–3275 in Chicago in order to place bets (R. 31–32). Green, under the name of Peters, had rented an apartment in Chicago which contained a telephone with the Midway number given to Mrs. Fall (R. 15–23, 120).

Mrs. Fall agreed to the plan. On the following day, Green telephoned Mrs. Fall and said that the arrangements had been made, *i.e.*, that her account was credited with $5,000, and that she should identify herself as "BF–5" when she placed her bets (R. 32–33, 71–72). From July 2 to July 13, telephone calls were made from MIdway 3–3275 to the residence of Mrs. Fall, and Mrs. Fall placed bets on horses by telephoning the Midway number in Chicago (R. 34–36, 71–72, 74–75, 114–115, 125). On July 13, Mrs. Fall had "winnings" of about $58,000, less the $5,000 "credit" (R. 36–37).

On July 14, Green met Mrs. Fall in Ohio and said that he needed $5,000 to cover the "credit" for her account; that he would be able to put up $3,500 of that amount; and that Mrs. Fall should put up the balance of $1,500 (R. 37). She agreed, and, shortly thereafter, paid $1,500 to Green. At about that time,

Green instructed Mrs. Fall to telephone Chicago and inform a "Mr. Michaels" that she wanted to withdraw $55,000 from her account (R. 40). He told her not to place that call "until he had time to get back to Chicago again" (R. 40). Mrs. Fall subsequently placed a telephone call to the Midway number in Chicago and left word for "Mr. Michaels" to call her (R. 41, 42). At about 5:00 p.m. that day (July 14), a "Mr. Michaels" telephoned Mrs. Fall (R. 42–43, 45–46). When apprised by Mrs. Fall that she wanted to withdraw $55,000 from her account, he said that her profit balance was about $63,000, and that he would "come down" and deliver $55,000 to her on the following day (R. 43–47). This was the only telephone call which Mrs. Fall received from Chicago or from either "Mr. Michaels" or Green on July 14th (R. 45–46). The records from telephone companies in Ohio and Illinois indicated that a long-distance telephone call was placed from Mrs. Fall's telephone to the Midway number in Chicago on July 14, and that, at about 11:00 p.m. on July 14, a telephone call from the Midway number in Chicago was placed to Mrs. Fall's residence (R. 115, 119–120, 125). This was the only telephone call which the telephone records indicated was made from the Midway number to Mrs. Fall's residence on July 14, 1960 (R. 115, 119–120).

At about noon on July 15, petitioner met Mrs. Fall at her residence in Holland, Ohio, and said that he was "Mr. Michaels" (R. 44–45). Mrs. Fall testified that the voice was the same as that of the one calling himself Mr. Michaels in the telephone conversation the day before (R. 107). Petitioner was carrying a black

case, and said that he had the money with him (R. 44–45, 50, 67–68). He said that his "boss" had told him that there were some "discrepancies" in the "playing", and that before he could give her the money, she would have to "show" $9,000 to the petitioner (R. 44). Petitioner said that "they paid in cash and they wanted to see cash" (R. 47). Mrs. Fall did not have $9,000, and the petitioner subsequently left her residence. Later that day, Green telephoned Mrs. Fall and said that she should try to raise the money and that he would try to raise some of the money (R. 47).

On July 20, Green met Mrs. Fall and said that his "boss" had sent him to protect "Mr. Michaels" who had the money, and that the "company" would not wait any longer for the $9,000 (R. 50). Mrs. Fall said that she could obtain $7,000 at a bank on the following day. Green said that he could raise the $2,000 balance. The two agreed to meet in front of the bank the next day (R. 53–54).

On July 21, Green was arrested by agents of the Federal Bureau of Investigation as he was conversing with Mrs. Fall in front of a bank (R. 141–142). Shortly thereafter, petitioner was arrested (R. 150–151).

2. During the early part of the trial, when no evidence had been introduced concerning petitioner, the trial court sustained objections on behalf of petitioner that the testimony was not to be considered as relating to petitioner. The court also instructed the jury on several occasions that they were not to consider the evidence at that time as being connected with

petitioner (see, *e.g.*, R. 28, 31). At the conclusion of the testimony of Mrs. Fall, the following colloquies transpired (R. 109–110):

> Mr. COLASURD [Assistant United States Attorney]. Your Honor, there were various objections by Mr. Rotenberg on much of the testimony previously offered on the basis of the fact that Mr. Fulton was not present nor was there any proof of a scheme to defraud. I think the Government has now sufficiently proved that and I would like to have the jury instructed that they can hear all that testimony with reference to both men.
>
> The COURT. That is true. The jury may consider the testimony insofar as it has been offered at this time as going to both of the defendants.
>
> Mr. ROTENBERG [counsel for petitioner]. Your Honor, we object to that inasmuch as it was not admitted with the reservation that later it might be tied up. I believe at the time it was merely stricken as to Mr. Fulton. Therefore, I don't see how at this time it can be admitted.
>
> The COURT. On the ground that there is no proof of a scheme to defraud.
>
> Mr. ROTENBERG. I didn't hear your Honor say that it was being stricken subject to the proving of that scheme, and of course we do not believe that such a scheme has as yet been proven.
>
> The COURT. You have the testimony of the witness here that the Court deems is sufficient so far as the requirements are concerned for linking the two defendants. That may stand.

In its instructions, the court pointed out that petitioner was charged only in count 2 (R. 164) and that (R. 165):

> In proving the guilt of the Defendant Russell Glenwood Fulton, the Government must establish beyond a reasonable doubt that the defendant did devise a scheme to defraud Bessie M. Fall and to obtain her money by means of false and fraudulent pretenses and promises which defendant knew to be false when made in manner as charged and that on or about July 14th for the purpose of executing such scheme he did transmit or did cause to be transmitted sounds by means of wire, to-wit: by telephone from Chicago, Illinois, to Holland, Ohio, as charged in the Indictment.

The court also charged (R. 167) that "[i]f one's intent is to defraud when he joins a dishonest scheme, he becomes a part of the scheme, although he may know nothing but his own share in the aggregate wrongdoing."

ARGUMENT

1. (*a*) There is no merit to petitioner's contention (Pet. 16–17) that the evidence was insufficient to support petitioner's conviction. The evidence is uncontradicted that Mrs. Fall received a telephone call from the petitioner on July 14, 1960, and there is no question but that the call was made in furtherance of the scheme to defraud (see the Statement, *supra*, p. 4).

(*b*) The remaining issue—whether the telephone call was an interstate one—is also not open to serious question. Mrs. Fall testified that the telephone call

which she received from "Mr. Michaels", whom she subsequently identified as the petitioner, was the only telephone call which she received from Chicago on July 14th (R. 45–46, 107). She said that Green did not telephone her because she had met with him in Ohio earlier that day (R. 46). The records of the Illinois Bell Telephone Company indicated that at about 11:00 p.m., on July 14, 1960, a telephone call was placed from the Midway number in Chicago to Mrs. Fall's telephone number in Ohio. The fact that the telephone records indicated that the call in question was placed at about 11:00 p.m., whereas Mrs. Fall testified that the call was received at about 5:00 p.m., was not such a discrepancy as would bar the jury from concluding that the call from "Mr. Michaels" came from Chicago.

Moreover, the circumstances surrounding the receipt of the telephone call in question indicated that the call came from Chicago. Green not only instructed Mrs. Fall on July 14 to telephone Chicago and inform "Mr. Michaels" that she wanted to withdraw $55,000 from her account, but, significantly, he told her not to place that call "until he had time to get back to Chicago again" (R. 40). His statement could reasonably be construed to mean that Green wanted to see the petitioner in Chicago prior to Mrs. Fall's telephone call there. Furthermore, Mrs. Fall placed a telephone call to Chicago on July 14 and left word for "Mr. Michaels" to call her back (in Ohio). When the petitioner returned the call later that day, he said in effect that he would "come down" (to Ohio) on the

following day and deliver the money to her (R. 43–47). Thus, the sum total of the evidence, both direct and circumstantial, justifies the conclusion that the petitioner used or caused the use of interstate telephone wires in furtherance of the scheme to defraud.

2. (*a*) Petitioner contends (Pet. 8–10, 15–16) that the trial court's instruction to the jury at the conclusion of Mrs. Fall's testimony that the jury could consider her testimony as relating to petitioner amounted to an instruction that the government had proved the existence of a fraudulent scheme. None of the court's instructions to the jury during the trial had such an effect or intendment. Mrs. Fall's testimony showed that petitioner had a connection with the scheme. The testimony was therefore properly admissible as against both defendants. At a trial of coconspirators, the trial judge has discretion to decide whether he will originally admit evidence as to all defendants, subject to having it stricken or limited in its effect if it does not connect all the defendants with the conspiracy, or will admit the evidence originally only as to the one to whom it directly relates, subject to having it apply to all the defendants if there is prima facie evidence that the others are members of the conspiracy. See *Hoeppel* v. *United States*, 85 F. 2d 237, 242 (C.A. D.C.), certiorari denied, 299 U.S. 557; 4 Wigmore, *Evidence*, Sec. 1079 (3d ed.), and 1959 Supplement, p. 67; 6 *id.*, Secs. 1870, 1871.

The trial court followed the latter course. The ruling at the conclusion of Mrs. Fall's testimony was

only an instruction to the jury that it could consider her testimony in relation to petitioner. The instruction did not remove from the case the issue whether the government had proved a scheme to defraud, for the court explicitly went on to point out that one of the elements of the offense was the existence of a scheme to defraud, that each of the elements had to be proved beyond a reasonable doubt before a finding of guilt could be made, and that, in determining the question of guilt as regards petitioner, he must be shown to have, *inter alia,* "devise[d] a scheme to defraud" (R. 165; see the Statement, *supra,* p. 7).

(*b*) Petitioner further contends (Pet. 11–15) that the trial court erred in failing to instruct the jury that a "common design or common concert of action" with Green was required before the testimony of Mrs. Fall could be admissible as to the petitioner. But the court did charge that a scheme to defraud which "is shared in by two or more men * * * becomes a conspiracy and is treated in law as such"; that, once a scheme to defraud has been devised, "another [person] may come into that scheme, may join it at any time during the perpetration, or attempted perpetration, or execution of the scheme"; and that no "formal agreement" is necessary to the establishment of a scheme to defraud, "it being sufficient if there is association and purpose to defraud" (R. 167–168). Thus the whole intendment of the charge as regards the scheme indicated that, before the jury could consider Mrs. Fall's testimony as relating to petitioner, it

had to find that the petitioner and Green acted in concert.[*]

Although petitioner relies (see Pet. 9–13) upon *United States* v. *Pronger*, 287 F. 2d 498 (C.A. 7), and *Schmeller* v. *United States*, 143 F. 2d 544 (C.A. 6), the present case differs from those cases in the nature of the proof and in the charge actually given. Petitioner was indicted only for his own use of the interstate wire. Unlike the defendants in *Pronger* and *Schmeller*, he was not charged with responsibility for acts performed by others in the furtherance of the scheme to defraud. The testimony relating to Green served largely as background with respect to petitioner. Under the instructions, the jury could not have found petitioner guilty without finding that he himself had made the call with which he was charged.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

DECEMBER 1961.

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[*] Moreover, since petitioner did not make this objection before the trial court, in accordance with Rule 30, F.R. Crim. P. (see R. 173–175), he is in no position to challenge the instructions on this ground.

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